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# BEYOND "SELLOUTS" AND "RACE CARDS": BLACK ATTORNEYS AND THE STRAITJACKET OF LEGAL PRACTICE

*Margaret M. Russell\**

## I. INTRODUCTION: REPRESENTING RACE

For attorneys of color, the concept of "representing race" within the context of everyday legal practice is neither new nor voluntarily learned; at a basic level, it is what we do whenever we enter a courtroom or conference room in the predominantly white legal system of this country. The ineluctable visibility of racial minorities in the legal profession, as well as the often unspoken but nevertheless deeply felt sense of racially hierarchical positioning to which this visibility subjects us, are aptly expressed in the following droll recollection of a 1960s-era Black civil rights lawyer:

A favorite story among Southern black attorneys was of the black lawyer who was to argue a case before the Mississippi Supreme Court. He had prepared his briefs with great precision and scholarship, and was quite confident that the law was in favor of his client — that is, as confident as a black lawyer can be in a Southern court. However, in his concentration on the law, he had neglected to look up the proper way to address the Supreme Court before beginning his argument. A stylized, formal address is always used in speaking to an appellate court, differing from court to court, but it's usually some variation of "May it please the distinguished Chief Justice and the distinguished Associate Justices of this Honorable Court." Being forced to call upon his instinct for an improvised form of address, he arose, looked up and down the bench, and said, "Good morning, white folks." His brief could not have stated the issue of the case more realistically and precisely than this spontaneous greeting.<sup>1</sup>

Although it is often assumed that people of color initiate or even "instigate" extemporaneous comments about race in legal pro-

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1. Edward A. Dawley, *Black People Don't Have Legal Problems*, Address at the Tom Paine Summer Law School (summer 1970), in *THE RELEVANT LAWYERS: CONVERSATIONS OUT OF COURT ON THEIR CLIENTS, THEIR PRACTICE, THEIR POLITICS, THEIR LIFE STYLE* 219, 220-21 (Ann Fagan Ginger ed., 1972) [hereinafter *THE RELEVANT LAWYERS*].

ceedings, the reality is that many people of color — like the Black lawyer in the tale above — simply articulate a subtext that is unmentioned but obvious: that their minority racial presence is forced into stark and distorted relief against an otherwise seemingly “transparent” background of white omnipresence.<sup>2</sup> Attorneys of color often find that they are identified, categorized, and evaluated first as members of their racial group, and only secondarily — if at all — as lawyers. In this sense, “representing race” is a fundamental and inescapable part of minority attorneys’ professional identity and political function as marginalized actors in the mainstream legal system, quite apart from and transcendent of the particulars of individual client representation. As suggested above, this phenomenon derives its salience from two factors: the paucity of people of color in the legal profession;<sup>3</sup> and the debasing and racially prejudicial slights to which they are subjected on a recurrent basis.<sup>4</sup>

Regarding the first factor, minority attorneys still suffer from severe underrepresentation in the legal profession. At the beginning of this decade, Blacks, Asian Americans, Latinos and Latinas, and Native Americans comprised only twelve percent of the

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2. Barbara Flagg defines “transparency” as the proclivity of whites to think of themselves as “raceless” unless they are in situations in which juxtaposition with people of color renders racial differences obvious: “The most striking characteristic of whites’ consciousness of whiteness is that most of the time we don’t have any. I call this the *transparency* phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific.” Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) [hereinafter Flagg, *Was Blind*]; see also Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2013 (1995) [hereinafter Flagg, *Fashioning a Title VII Remedy*]. For an extended application of the concept of transparency to the historical and legal construction of white racial identity, see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

3. See generally TASK FORCE ON MINORITIES IN THE LEGAL PROFESSION, A.B.A., REPORT WITH RECOMMENDATIONS (1986) (recommending adoption by the ABA of policies to integrate the legal profession and create more opportunities for minority lawyers); Ramsey Campbell, *State’s Legal System Lacks Minorities, Commission Says; Racial and Ethnic Bias Study Concludes Underrepresentation Has Created an Unfair System*, ORLANDO SENTINEL TRIB., Nov. 14, 1991, at D1; Rita Henley Jensen, *Minorities Didn’t Share in Firm Growth*, NATL. L.J., Feb. 19, 1990, at 1; Steven Keeva, *Unequal Partners: It’s Tough at the Top for Minority Lawyers*, A.B.A. J., Feb. 1993, at 50; Alexander Stille, *Little Room at the Top for Blacks, Hispanics; Outlook Better for Women, Asians*, NATL. L.J., Dec. 23, 1985, at 1; Doreen Weisenhaus, *Still a Long Way to Go for Women, Minorities: White Males Dominate Firms*, NATL. L.J., Feb. 8, 1988, at 1. Racial exclusion is revealed by not only the number of practicing lawyers, but of law faculty and law students as well. See, e.g., *Minority Women Lagging in Law Faculties*, N.Y. TIMES, Apr. 3, 1992, at A19; Sandra Torrey, *At Yale Law, a Gender Gap in Who Gets Clerkships Sparks Debate*, WASH. POST, May 13, 1991, at F5 (reporting on gender and race disparities in the selection of law students for clerkships).

4. See generally Claudia MacLachlan, *Legal Bias: Attorneys See Discrimination*, ST. LOUIS POST-DISPATCH, Dec. 3, 1989, at E1; David Margolick, *Bar Group Is Told of Racial Barriers*, N.Y. TIMES, Feb. 16, 1985, at 15; Lena Williams, *For the Black Professional, the Obstacles Remain*, N.Y. TIMES, July 14, 1987, at A16; Jeannie Wong, *Panel Hears How Minorities See Court System*, SACRAMENTO BEE, Apr. 11, 1992, at B1.

nation's law students, less than eight percent of lawyers, eight percent of law professors, and two percent of the partners at the nation's largest law firms.<sup>5</sup> When compared with the overall percentage of people of color in the national population — approximately twenty-five percent<sup>6</sup> — these paltry figures illustrate the extent to which attorneys of color are still very much a token presence in the legal system.<sup>7</sup> Worse still, this phenomenon doubly exacerbates the conditions of isolation experienced by minority lawyers, because their numbers are just high enough to undermine claims of white racial exclusivity in the profession, yet far too low to facilitate the comforting sense of belonging or even anonymity that attaches quite naturally to white lawyers.<sup>8</sup>

The double bind that tokenization imposes on minority attorneys is the pressure to comport themselves generally as though the legal profession is integrated, colorblind, and even raceless, yet to take on the burdens — gratefully! — of role-modeling and otherwise representing their race on the occasional race commission or diversity committee instituted by their colleagues to manifest concern for the plight of minorities. Thus, minority attorneys, even while expressing their desire to volunteer to assist communities of color within and outside the legal profession, sometimes complain that they are somehow expected “naturally” to take on the emotional and temporal demands of extra “race work” as though

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5. See DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD 53-54 (1994) (citing Jensen, *supra* note 3, at 1).

6. See RHODE, *supra* note 5, at 53.

7. See Jensen, *supra* note 3, at 28-29.

8. Invoking her everyday personal experiences as a white woman, Peggy McIntosh attributes this sense of ease to white privilege, which she describes as

an invisible package of unearned assets that I can count on cashing in each day, but about which I was “meant” to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.

Peggy McIntosh, *Unpacking the Invisible Knapsack: White Privilege*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33. For additional recent works advancing a theoretical critique of white privilege and its effects on legal and social relations, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., forthcoming 1997); LÓPEZ, *supra* note 2; STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PRIVILEGE UNDERMINES AMERICA (1996); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996); Flagg, *Fashioning a Title VII Remedy*, *supra* note 2; Flagg, *Was Blind*, *supra* note 2; Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 PENN. L. REV. 1659 (1995); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-95 (1996).

it were the responsibility solely of nonwhites to eradicate discrimination.<sup>9</sup>

If tokenization represents the first set of problems confronting minority attorneys, a second set of obstacles may be attributed to the daily, unrelenting mistreatment to which many minority attorneys are subjected. Attorneys of color often find their everyday professional and personal encounters peppered with reminders of their minority status in the legal system.<sup>10</sup> For example, the New York Judicial Commission on Minorities found that fourteen percent of its surveyed litigators asserted that judges, lawyers, or courtroom personnel publicly repeat ethnic jokes, use racial epithets, or make demeaning remarks about a minority group "often" or "very often"; another twenty-three percent stated that such comments occur "sometimes."<sup>11</sup> Moreover, minorities in the legal profession report anecdotally that outside the legal setting — for example, in pursuing such mundane tasks as hailing taxis,<sup>12</sup> boarding elevators,<sup>13</sup> shopping for clothes,<sup>14</sup> or driving down the street<sup>15</sup> — they

9. On the burdens of "race work," see Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1226-27 (1991). Delgado writes:

Suppose you saw a large sign saying, "ROLE MODEL WANTED. GOOD PAY. INQUIRE WITHIN." Would you apply? Let me give you five reasons you should not.

*Reason Number One.* Being a role model is a tough job, with long hours and much heavy lifting. You are expected to uplift your entire people. Talk about hard, sweaty work!

*Id.* (footnotes omitted).

10. A common complaint among minority attorneys is that in legal proceedings they are often presumed to be nonattorneys, e.g., criminal defendants, bailiffs, spectators, or — if female — court reporters or parties' wives. See, e.g., Editorial, N.J. HERALD & NEWS, Sept. 16, 1991, at A4, quoted in RHODE, *supra* note 5, at 125 n.36 ("I'll come into the courtroom wearing a \$500 suit with a legal folder full of briefs under my arm and the courtroom official or guard will order me into the defendant's chair," said Newark attorney Robert L. Brown, a black man. "They just assume automatically that if you're black, you're the one on trial."").

11. See Arthur S. Hays & Amy Stevens, *Racism Is Said to Pervade New York Courts*, WALL ST. J., June 5, 1991, at B6.

12. "Taxi stories" — describing the inability to hail a cab because of the cab driver's trepidation of the would-be passenger's skin color — are prevalent in the experiences of urban professionals of color, particularly Black males. The taxi story even entered the ranks of Hollywood movie mythology in the legal thriller *The Pelican Brief*, in which the swash-buckling hero played by Denzel Washington is stymied in his efforts to chase down an investigative lead because he cannot hail a taxi on the street in Washington, D.C. See also HENRY LOUIS GATES, JR., *LOOSE CANNONS: NOTES ON THE CULTURE WARS* 147 (1992); CORNEL WEST, *RACE MATTERS*, at ix-xvi (1993).

13. See Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49-51 (1991) (describing two white women's refusal to board an elevator in a "luxury condominium" with "five well-dressed Black women in their thirties and forties"); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560-61 (1989) (recounting a white female passenger's ridicule of a Black woman waiting to board the elevator).

14. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991) (chronicling the author's exclusion from Benetton, a chic clothing store).

are visually "sized up" according to their color rather than the accoutrements of upper-middle-class professional status that they thought might insulate them from suspicion.<sup>16</sup> The debilitating, lingering effects of such routine and recurrent degrading treatment should not be underestimated as significant influences in the formation of professional identity. Most attorneys of color are forced to invoke the prevailing lawyerly ethos of becoming thick-skinned and detached — that is, if they hope to remain in the profession with their sanity and composure reasonably intact. This response, combined with other age-old survival mechanisms used by people of color trapped in racist environments, usually helps render everyday interactions tolerable. But it would be naïve to assume that the above factors — tokenization and everyday, microaggressive harassment — do not exert a profound and destabilizing impact upon minority lawyers' conceptions of professionalism, attorney-client interaction, case selection, lawyering strategy, courtroom behavior, and a host of other concerns. For women of color in the legal profession, gender bias further exacerbates the burdens of "high visibility, few mentors and role models, and additional counseling and committee responsibilities."<sup>17</sup> Although research literature infrequently addresses the particular obstacles faced by those also discriminated against on the basis of sexual orientation or disability, one might well imagine the inhibitory effects of those factors as well.

Therefore, when a symposium such as this focuses much-needed scholarly attention on the possible intersections of critical theory and progressive practice with respect to the representation of race in the legal process, it is crucial to keep in mind that attorneys of color bring vastly different experiences from those of white attor-

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15. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 691 n.76 (1995) (quoting Henry L. Gates, Jr., *Thirteen Ways of Looking At A Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 58 (relating common experiences of prominent Black men who have been subjected to vehicle stops by the police and noting that "Blacks — in particular, black men — swap their [negative] experiences of police encounters like war stories, and there are few who don't have more than one story to tell. . . . There's a moving violation that many African-Americans know as D.W.B.: Driving While Black")).

16. Sadly, the tacit acknowledgement of class hierarchy in the telling of these tales is as lamentable as are the lessons of racial bias. What, one wonders, do these anecdotes reveal about assumptions made regarding the humanity of people of color who could never afford to take cabs, shop at upscale stores, dine in swanky restaurants, or drive BMWs?

17. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1191 (1988). Few sources document the unique biases faced by women of color in the legal profession. For compelling accounts of the personal experiences of Black women in legal education, see generally *Black Women Law Professors: Building a Community at the Intersection of Race and Gender, a Symposium*, 6 BERKELEY WOMEN'S L.J. 1 (1990-91).

neys to the underlying issues at hand. Regardless of which specialty or career path within the legal profession minority attorneys choose, they face a distinctly different set of obstacles than do whites, particularly in cases potentially involving racial issues. Although recent scholarship in lawyering theory has been quite illuminating in exploring a broad array of themes concerning the socially constructed nature of client identity and lawyer identity in progressive practice, the role of race in these constructions deserves greater attention.<sup>18</sup>

In this essay, I focus on some of the pressures and constraints faced by Black attorneys in particular when addressing issues of race in legal proceedings.<sup>19</sup> I argue that when issues of race are at least arguably relevant factors in a case, Black attorneys face an unduly restrictive set of choices, each of which carries impossible burdens. Saddled with the tacit professional expectation of being responsible for identifying, fixing, or rationalizing away race problems *outside* the courtroom, Black attorneys who raise such concerns *in* court often face a heavy burden of justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner. When Black attorneys articulate racism as a primary factor in a particular case, they may encounter fractious demands that they "prove it," or harsh accusations that they are "playing the race card" or otherwise engaging in unprofessional behavior. Conversely, when Black attorneys take on advocacy obligations that require the subordination and decontextualization of issues of race in the service of other

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18. Recent articles exploring these concerns include Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Michelle S. Jacobs, *Legitimacy and the Power Game*, 1 CLINICAL L. REV. 187 (1994); Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993).

19. Some of the observations expressed in this article about the quandaries faced by Black lawyers might be applied to lawyers of minority-group status generally. However, the Darden-Cochran conflict — and the set of race and legal practice issues that it embodies — strikes me as particularly emblematic of burdens specifically faced by Black lawyers because of the culturally distinct set of stereotypes endured by Blacks. In using expansive terms such as "Black lawyers" and "Black communities," I am of course mindful of the diversity of backgrounds and viewpoints that these labels necessarily include.

I also acknowledge that within the community of Black attorneys, other factors (e.g., gender and sexual orientation) signify other salient differences in experiences and perspectives. This article posits that the problems discussed herein apply to Black attorneys generally, without delving into those additional dimensions.

objectives, they may be labeled as "sellouts" who have abandoned their communities. Whatever the choice, the focus of such cases inevitably becomes not just race, but *their* race and *their* lawyerly merits as well. Unlike white attorneys, who have the relatively luxurious comfort of invisibility and transparency in raising issues of race in the lawyering process, Black attorneys must always brace themselves to have *their* racial, professional, and personal identities placed in issue as well. This additional layer of scrutiny and suspicion may in turn raise for the Black attorney difficult professional and personal questions of identity, autonomy, authenticity, and loyalty. Unless, as suggested above, Black attorneys steel themselves mentally and emotionally for the extra demands of race work in a legal system that still operates on the unspoken assumption that fixing race problems is naturally the work of minorities, they are destined to lead professional lives of fatigue, frustration, and perhaps exploitation.<sup>20</sup> This in turn significantly undermines the social-justice imperatives that lead public-spirited Blacks — whether in the private or public sectors — to select law as a career path in the first place.

Thus, I argue, Black attorneys encounter not only a glass ceiling barring their vertical and hierarchical career advancement, but a type of glass bubble as well that severely circumscribes the flexibility and creativity so critical to the Black lawyer's — or indeed any lawyer's — professional identity. Stereotypical, externally imposed assumptions about the role and function of Black attorneys have the powerful effect of straitjacketing and asphyxiating Blacks in an already highly restrictive environment. While it is important for Black lawyers — like other lawyers — to subject themselves to rigorous critique regarding the political and societal implications of their career choices and professional behavior, I am wary of the strong tendency of mainstream popular and legal discourses to find ways to castigate Black attorneys for problems essentially not of their creation. Thus, in evaluating the microcosm of Black legal practice, it is essential to locate it within its macrocosm of constructed racial meaning. The Black attorney generally is not accorded the respect, autonomy, or even anonymity enjoyed by her white colleagues, and she is therefore doubly disadvantaged by the imposition of careerist pigeonholes and expectations.

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20. For a report on the enervating effects of tokenism on minority law professors, see generally Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419 (1986); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).



To illustrate the straitjacketing that I suggest is quite typical in the life of the Black attorney, I draw upon a seemingly atypical example: public commentary on the work of two prominent and now infamous Black attorneys — prosecutor Christopher Darden and defense attorney Johnnie Cochran in the murder prosecution of O.J. Simpson. Because of the ubiquity of media coverage of the trial — including the melodramatic effect of cameras in the courtroom — Cochran and Darden rapidly became two of the most recognizable Black lawyers in this nation's history. Only the televised confrontation of Clarence Thomas and Anita Hill has exposed Black attorneys so intensely to the voyeuristic scrutiny of the American television-viewing public.<sup>21</sup> Yet, a closer examination of public attitudes toward Darden and Cochran reveals patterns quite common in the treatment of Black lawyers generally.

Public (including media) reaction to the lawyering styles of these two men in the so-called "Trial of the Century"<sup>22</sup> exemplifies what I describe below as the "'Sellout' vs. 'Race Card'" trope: when issues of race are even potentially relevant in a particular case, Black attorneys are cabined within a false dichotomy of options that implicate not just questions of lawyering strategy, but public generalizations about their racial identities and professional skills as well. The dichotomy is false because its components have been erroneously constructed as opposites: (1) claiming the irrelevance of race, or perhaps even denying so vehemently that racism is at issue that one is branded an "assimilationist" or "sellout;" *versus* (2) raising racism as an issue, thereby risking accusations that one is recklessly "playing the race card" and pandering to racial tensions.

In my view, this putative oppositeness is a construct that obscures the complexity of the value and strategy choices faced by Black attorneys in several ways. First, in the metanarrative or "master narrative"<sup>23</sup> of a predominantly white legal system, this

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21. On the popular cultural mythology engendered by the Hill-Thomas hearings, see Anna Deavere Smith, *The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture*, in *RACE, GENDER AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 248 (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

22. Gerald F. Uelman wryly notes that his research "has uncovered at least thirty-two trials since 1900 that have been called a 'trial of the century.'" GERALD F. UELMAN, LESSONS FROM THE TRIAL: *THE PEOPLE V. O.J. SIMPSON* 204 (1996).

23. See Lisa Lowe, *Heterogeneity, Hybridity, Multiplicity: Marking Asian American Differences*, 1 *DIASPORA* 24, 26 (1991) (discussing the role of metanarratives or "master narratives" in imposing "minority" cultural identity upon Asian Americans). In discussing the role of media discourses in sharpening tensions between African Americans and Korean Americans in the wake of the acquittal of the police officers in the first "Rodney King" trial, Lisa Ikemoto observes: "I use 'master narrative' to describe white supremacy's prescriptive, conflict-constructing power, which deploys exclusionary concepts of race and privilege in ways

false construction of opposites serves the backlash function of focusing attention on microcosms of intraracial conflict and public criticisms of individual Black attorneys, rather than on the more noxious legal and social contexts in which they operate. Second, it straitjackets Black attorneys by stereotyping and unnecessarily restricting their choices of potential advocacy strategies. Finally, the hyperbole surrounding the false dichotomy mischaracterizes the meaning of community affiliation and racial identification to many Black attorneys who are engaged in an ongoing struggle to be viewed not as racial icons, but as real-life, three-dimensional human beings.

Accordingly, this essay addresses the "Sellout"- "Race Card" quandary in the following manner: Part II briefly sets forth as illustrative the experiences of an earlier generation of Black attorneys who faced overt challenges to their professional competence based solely on their identities and experiences as Blacks. Part III describes the "sellout" and "race card" tropes as used against Darden and Cochran, respectively, in the Simpson case; I use these terms to epitomize the constraints faced by Black attorneys as they struggle through complex questions of race within the context of individual cases. I conclude by urging Black attorneys to resist such straitjacketing, particularly in the service of progressive antisubordination lawyering strategies.

Given the almost overwhelming degree of fascination with the O.J. Simpson case, its cultural and intellectual implications, and its variable symbolic values,<sup>24</sup> one major caveat bears mention and reiteration: this is not an essay about the merits of the Simpson case,<sup>25</sup> nor about the personal characters or legal talents of Christo-

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that maintain intergroup conflict." Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American / Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1582 (1993) (footnote omitted). I suggest that Ikemoto's point might be applied usefully to the role of the master narrative in maintaining *intragroup* conflict — such as "Darden versus Cochran" or "sellouts versus race cards" — as well. See also Charles R. Lawrence III, *The Message of the Verdict: A Three-Act Morality Play Starring Clarence Thomas, Willie Smith, and Mike Tyson, in RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS*, *supra* note 21, at 118 n.3 ("In using the term 'Master Narrative' . . . I refer . . . to the narrative of American society in which the subordination of certain groups has been structured along race and gender lines").

24. See Janny Scott, *The Joy of Deconstructing O.J.: At Symposium, Deep Thoughts and Cheap Thrills*, N.Y. TIMES, Sept. 25, 1996, at B1 (analyzing scholarly obsession with deriving social significance and historical lessons from the Simpson case). For a compelling analysis of race and gender in both the O.J. Simpson and Susan Smith murder trials, see Cheryl I. Harris, *The Foulston & Siefkin Lecture: Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith — Spectacles of Our Times*, 35 WASHBURN L.J. 225 (1996).

25. There are, of course, voluminous sources of information about this matter. Major media have covered the case since its inception in June 1994 with the murders of Nicole Brown Simpson and Ronald Goldman, and their preoccupation continued in connection with

pher Darden and Johnnie Cochran. For what it is worth, I believe that both men are talented lawyers committed in many respects to racial justice and Black community betterment. Rather, my point is to demonstrate that the public accentuation of the Cochran-Darden conflict — as well as the valorization and vilification to which each man has been subjected — reveals far more about the burdens shared by all Black attorneys than about Cochran's and Darden's individual differences.

## II. LESSONS FROM ELDERS: THE NEXUS BETWEEN RACE AND THE UNDERMINING OF PROFESSIONAL CREDIBILITY

The achievements and visibility of a substantial number of Blacks in the legal profession constitute a relatively new phenomenon, but the scrutiny and suspicion with which they are treated in mainstream legal practice do not. Often, such distrust expresses an underlying belief that being reasoned and objective as a legal professional — particularly with regard to issues of race — is somehow at odds with the sustenance of Black racial identity. For example, a generation ago, in *Pennsylvania v. Local Union 542, International Union of Operating Engineers*,<sup>26</sup> Judge Leon Higginbotham was called upon by defendants to recuse himself from a class action brought under the Civil Rights Act of 1964 and other civil rights statutes. The state-initiated suit sought legal and equitable relief against defendant union officials for alleged race discrimination against the twelve Black complainants and the class they represented. In their motion for recusal,<sup>27</sup> the defendants argued that Judge Higginbotham's status as a prominent Black civil rights scholar and advocate rendered him unqualified to adjudicate claims of race discrimination in a fair and impartial manner. In a lengthy

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the civil trial of the Brown and Goldman families' against Simpson. In addition, many of the attorneys on both sides of the criminal prosecution have published books about the trial. See, e.g., JOHNNIE L. COCHRAN, JR. WITH TIM RUTTEN, *JOURNEY TO JUSTICE* (1996); CHRISTOPHER A. DARDEN WITH JESS WALTER, *IN CONTEMPT* (1996); ALAN M. DERSHOWITZ, *REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* (1996); ROBERT L. SHAPIRO WITH LARKIN WARREN, *THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE O.J. SIMPSON CASE* (1996); UELMEN, *supra* note 22. Other recent books about the case include VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* (1996) and JEFFREY TOOBIN, *THE RUN OF HIS LIFE* (1996). Recently, a law journal devoted an entire issue to the topic of race and gender in the Simpson case. See 6 *HASTINGS WOMEN'S L.J.* 121 (1995).

26. 388 F. Supp. 155 (E.D. Pa. 1974).

27. See generally 28 U.S.C. § 144 (1988) ("Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.").

and detailed consideration of the motion, Judge Higginbotham summarized the defendants' reasons for requesting disqualification as follows:

That "I [have] identified, and [do] identify, [myself] with causes of blacks, including the cause of correction of social injustices which [I believe] have been caused to blacks"; that I have made myself "a participant in those causes, including the cause of correction of social injustices which [I believe] have been caused to blacks"; . . . [t]hat "in view of the applicable federal law," and by reason of my "personal and emotional commitments to civil rights causes of the black community, the black community expectation as to [my] leadership and spokespersonship therein, and the basic tenet of our legal system requiring both actual and apparent impartiality in the federal courts," my "continuation . . . as trier of fact, molder of remedy and arbiter of all issues constitutes judicial impropriety."<sup>28</sup>

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28. 388 F. Supp. at 158 (quoting defendants' affidavits in support of the motion). In his opinion denying the motion, Judge Higginbotham summarized the fifteen allegations relied upon by the defendants in their affidavits. The accompanying text represents the court's summary of the last two of these fifteen points, which I have chosen to excerpt because they seem most emblematic of the charge of "bias" brought by the defendants. However, because I do not wish to risk mischaracterizing or unfairly truncating the broad-ranging nature of defendants' plethora of claims of bias, I include Judge Higginbotham's summary of their first thirteen points as well:

1. That the instant case is a class action, brought under the Civil Rights Act of 1964 and other civil rights statutes, charging that defendants have discriminated against the twelve black plaintiffs and the class they represent on the basis of race, and seeking extensive equitable and legal remedies for the alleged discrimination;
2. That I will try the instant case without a jury, and that I am black;
3. That on Friday, October 25, 1974, I addressed a luncheon meeting of the Association for the Study of Afro-American Life and History, during the 59th Annual Meeting of that organization, "a group composed of black historians";
4. That in the course of that speech I criticized two recent Supreme Court decisions which involved alleged racial discrimination, and said, *inter alia*, that:
  - (a) "I do not see the [Supreme] Court of the 1970's or envision the Court of the 1980's as the major instrument for significant change and improvement in the quality of race relations in America";
  - (b) "The message of these recent decisions is that if we are to deal with the concept of integration, we must probably make our major efforts in another forum";
  - (c) "As I see it, we must make major efforts in other forums without exclusive reliance on the federal legal process."
5. That I used the pronoun "we" several times in the course of the speech, and that my use of this pronoun evidences my "intimate tie with and emotional attachment to the advancement of black civil rights";
6. That by my agreement to deliver the speech I presented myself as "a leader in the future course of the black civil rights movement";
7. That my speech took place in "an extra-judicial and community context," and not in the course of this litigation;
8. That the following day, Saturday, October 26, 1974, *The Philadelphia Inquirer* published "an article appearing under a predominant headline on the first page of the metropolitan news section, . . . describing the October 25th meeting and publishing the aforementioned quotes";
9. That approximately 450,000 copies of *The Philadelphia Inquirer* containing this account were distributed publicly on or about October 26, 1974;
10. That this account made "the community at large" aware of my "significant role as a spokesman, scholar and active supporter of the advancement of the causes of integration";

The extraordinary nature of the defendants' disqualification motion did not go unnoticed by Judge Higginbotham, nor did its underlying assumptions about the nexus between being Black and the ability to fulfill professional obligations of fairness and impartiality with respect to issues of race. In an opinion even more extraordinary than the motion itself, Judge Higginbotham engaged in a brilliant disquisition on racial injustice, the burdens suffered by Blacks in the legal profession,<sup>29</sup> and the "raced" nature of all jurisprudence. Acknowledging the difficulty inherent in acting as "judge in [one's] own case"<sup>30</sup> — that is, in assessing his own impartiality, as required by the recusal statute — Judge Higginbotham carefully addressed the factual underpinnings of each of the defendants' assertions and responded to their claims of bias in great detail. He explained why his pride in his heritage and commitment to racial equality should not be viewed as a "partisan" matter that would somehow compromise or undermine his professional integrity.<sup>31</sup> In rejecting the defendants' tacit presumption that a Black judge posed a unique threat to norms of judicial neutrality with respect to race, he commented:

[A] threshold question which might be inferred from defendants' petition is: Since blacks (like most other thoughtful Americans) are aware of the "sordid chapter in American history" of racial injustice, shouldn't black judges be disqualified *per se* from adjudicating cases involving claims of racial discrimination? . . . [T]he absolute consequence and thrust of their rationale would amount to, in practice, a *double standard* within the federal judiciary. By that standard, white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing matters of intellectual substance, even issues of

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11. That I believe "that there has been social injustice to blacks in the United States"; "that these injustices must be corrected and remedied"; and "that they must be remedied by extra-judicial efforts by blacks, including [myself]";

12. That "the very invitation to speak," "the content of [my] remarks" and my "posing for photographs" after the address identify me as "a leader for and among blacks," and "one of the country's leading civil rights proponents";

13. That I am a "celebrity" within the black community . . .

388 F. Supp. at 157-58 (footnotes omitted).

29. In explaining the considerable lengths undertaken to provide historical context, scholarly documentation, and precise analytical constructs for his reasoning in denying a seemingly "simple" motion to recuse, Judge Higginbotham commented:

Blacks must meet not only the normal obligations which confront their colleagues, but often they must spend extraordinary amounts of time in answering irrational positions and assertions before they can fulfill their primary public responsibilities.

388 F. Supp. at 181-82.

30. 388 F. Supp. at 161.

31. See 388 F. Supp. at 166; see also 388 F. Supp. at 163 ("I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean, *ipso facto*, that he is anti-white; no more than being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant. . . .").

human rights and, because they are white, still be permitted to later decide specific factual situations involving the principles of human rights which they have discussed previously in a generalized fashion. But for black judges, defendants insist on a far more rigid standard, which would preclude black judges from ever discussing race relations even in the generalized fashion that other justices and judges have discussed issues of human rights. Under defendants' standards, if a black judge discusses race relations, he should thereafter be precluded from adjudicating matters, involving specific claims of racial discrimination.<sup>32</sup>

Although Judge Higginbotham's opinion in *Pennsylvania v. Local Union 542* represents the most detailed response to a motion for disqualification made in this vein, other Black judges have been subjected to similar challenges. Judge Constance Baker Motley, for example, defended her professional competence to preside over a sex discrimination case, explaining with withering succinctness that *everyone* — and not just she as a Black woman — is possessed of racial identity and gender identity.<sup>33</sup> Judge Higginbotham's and Judge Motley's observations, although articulated over two decades ago in the context of recusal challenges to the professional competence of Black members of the judiciary, have enormous significance for Black lawyers today who demand mainstream respect for and acceptance of their many-faceted roles as legal professionals and as advocates for racial and gender justice. One of the hard truths learned from Judges Higginbotham, Motley, and other "elders"<sup>34</sup> is that "*minority*" race, gender, or both subject one to ongo-

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32. 388 F. Supp. at 165 (footnotes omitted).

33. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4-5 (S.D.N.Y. 1975); see also *United States v. Alabama*, 582 F. Supp. 1197, 1200-02 (N.D. Ala. 1984) (Dyer, J.) (denying motion for disqualification filed against Judge U.W. Clemon in a race segregation case after the U.S. Court of Appeals ordered that another judge be assigned to hear the recusal proceedings); *Paschall v. Mayone*, 454 F. Supp. 1289, 1301 (S.D.N.Y. 1978) (Carter, J.) (denying motion for disqualification in race discrimination case). Interestingly, all three of the above cases — as well as *Pennsylvania v. Local Union 542* — involved challenges to the impartiality of Black judges who had been civil rights lawyers before their appointments to the bench. For a recent example of the controversy surrounding a recusal motion filed against a Black federal judge in a civil rights case, see Doug Bandow, *No Justice for Proposition 209*, WASHINGTON TIMES, Jan. 14, 1997, at A15 (discussing efforts to remove Judge Thelton E. Henderson from presiding over *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1488 (1996)); Howard Mintz, *Prop. 209 Defenders Struggle in Court*, THE RECORDER, Dec. 17, 1996, at 1; Carol Ness, *Temporary Ban on Prop. 209 Extended to All Agencies; Preference Law's Supporters Seek Judge's Ouster*, Citing ACLU Connections, SAN FRANCISCO EXAMINER, Dec. 17, 1996, at A3. For examples of recusal motions based on allegations of other "group"-related loyalties, see *United States v. Ibrahim El-Gabrowni*, 844 F. Supp. 955, 961-62 (S.D.N.Y. 1994) (Mukasey, J.) (denying motion for disqualification in the World Trade Center bombing prosecution which was based in part on defense attorney William Kunstler's assertions that Judge Mukasey's adherence to precepts of Orthodox Judaism and Zionism would cause him to be biased against the defense and providing examples of other recusal motions).

34. For other chronicles of these "elders," see DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994); J.L. CHESTNUT, JR. & JULIA CASS,

ing and pervasive assumptions of nonobjectivity and incompetence, particularly with regard to explicitly raced or gendered cases; the presumption is that "minority" group loyalties will taint professional ethics in a way that "majority" affiliations will not. As I shall discuss below, the present-day manifestations of these beliefs are different only in form but not in substance from the more explicit racial stereotypes applied to Black lawyers of earlier generations.

### III. "SELLOUTS" AND "RACE CARDS": THE DARDEN DILEMMA AND THE COCHRAN CONUNDRUM

#### A. *The Darden Dilemma Redefined*

In his bestselling memoir of the Simpson case, prosecutor Christopher Darden comments:

I understand that some black prosecutors have a name for the pressure they feel from those in the community who criticize them for standing up and convicting black criminals. They call it the "Darden Dilemma."<sup>35</sup>

Darden elaborates upon this theme in considerable detail throughout his book, explaining that his affection, pride, and concern for the Black community — *his* community — significantly motivated his decision to seek a law degree and to become a prosecutor.<sup>36</sup> He informs the reader of his life-long personal and professional commitment to the betterment of African Americans.<sup>37</sup> He further points out that in his pre-Simpson prosecutorial career, he devoted

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BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR. (1990); MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH (1992); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); PAULI MURRAY, SONG IN A WEARY THROAT: AN AMERICAN PILGRIMAGE (1987); JESSIE CARNEY SMITH, EPIC LIVES: ONE HUNDRED BLACK WOMEN WHO MADE A DIFFERENCE (1993); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); GILBERT WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984); John George, *Solo in Soul Country*, in *THE RELEVANT LAWYERS*, *supra* note 1, at 367-82.

35. DARDEN, *supra* note 25, at 472-73. The so-called Darden Dilemma has persisted as a subject of much commentary in the mainstream press — nationally and internationally — even many months after the Simpson verdict. See, e.g., William Claiborne, *One Angry Man: He Couldn't Convince the Jury, but Christopher Darden Isn't Resting His Case*, WASH. POST, Mar. 20, 1996, at B1; Ellis Cose, *The Darden Dilemma*, NEWSWEEK, Mar. 25, 1996, at 58; Ros Davidson, *Lawyer at Heart of Race Dilemma*, SCOTLAND ON SUNDAY, May 26, 1996, at 15, available in LEXIS, News Library, Curnws File; Ken Hamblin, *No Excuse for Color-Coded Justice*, ATLANTA J. & CONST., Apr. 10, 1996, at A15, available in 1996 WL 8200403; Stebbins Jefferson, *Guilty of Having Moral Standards*, PALM BEACH POST, Apr. 6, 1996, at A1, available in LEXIS, News Library, Curnws File.

36. See DARDEN WITH WALTER, *supra* note 25, at 65-67, 106-07.

37. See *id.* at 14, 201, 471.

considerable energies to investigating and prosecuting racist and other lawless behavior in the Los Angeles Police Department.<sup>38</sup> Why then, he anguishes, was he branded by some in the Black community a "sellout" and a "token" for his decision to join in the prosecution of a wealthy Black celebrity who had evinced little concern for Blacks and had immersed himself in white privilege throughout his adult life? Darden laments:

I had naively believed my presence would, in some way, embolden my black brothers and sisters, show them that this was their system as well, that we were making *progress* . . . [I]nstead I was branded an Uncle Tom, a traitor used by The Man.<sup>39</sup>

Notwithstanding what I consider to be his genuine and justifiable torment over his apparent ostracism from some in the Black community,<sup>40</sup> I think that Darden's articulation of the so-called Darden Dilemma ignores the root cause of his quandary. In his insistence on interpreting the charges of "sellout" and "token" almost entirely as a personal individual slight against him by the Black community rather than as a justifiably skeptical reaction to the broader racial implications of the supposedly colorblind prosecutorial strategies employed in the Simpson case,<sup>41</sup> he seems

38. *See id.* at 117-39.

39. *Id.* at 13-14.

40. Despite the pervasive impression that Darden was uniformly reviled and rebuffed by a "monolithic" Black community, some Black leaders praised his work on the case and acknowledged the difficult nature of his role on the prosecution team. *See, e.g.,* Andrea Ford, *Black Leaders to Honor Darden as Role Model*, L.A. TIMES, Dec. 13, 1995, at B1; *see also* Henry Weinstein, *Delicate Case Ends on Up Note for Darden*, L.A. TIMES, Sept. 28, 1995, at A1. Weinstein reported the views of two Black leaders thus:

"As an African American lawyer, I would say that the buttons on my shirt were popping with pride — he did a magnificent job," said Reginald Holmes, former president of the Langston Bar Assn., the largest black lawyers organization in Southern California.

. . . "From the beginning he's been in the hot seat — an almost impossible position," said Earl Ofari Hutchinson, veteran black activist and . . . author of the forthcoming book "Beyond O.J.: Race, Sex, and Class Lessons for America."

"He's feeling the pressure. He's got to be mindful of the negative comments. I think it has caused him a lot of personal discomfort and cognitive dissonance. He's in a no-win situation."

*Id.* at A18.

41. Others have articulated and emphasized quite different concerns in defining the Darden Dilemma. *See, e.g.,* Paul Butler, *Christopher Darden: Sour Grapes From a Sore Loser*, L.A. TIMES, March 25, 1996, at B5 (criticizing Darden for invoking a so-called dilemma as an excuse to blame Black jurors for his own professional mistakes, and asserting that Blacks generally are proud of Black prosecutors who use their power responsibly); Joan Ullman, *In Contempt*, N.Y. L.J., Apr. 26, 1996, at 2 (reviewing DARDEN WITH WALTER, *supra* note 25 (summarizing the underlying question posed by the Darden Dilemma as: "How can any black prosecutor justify his role of sending more black men into prisons already overcrowded with this minority population, or worse yet, of wresting convictions that carry the death penalty?")); James Varney, *Few Black Lawyers Work for DA's Office*, NEW ORLEANS TIMES-PICAYUNE, Apr. 15, 1996, at A1, available in LEXIS, News Library, Curnws File



to view his dilemma as a dichotomous conflict of a Black prosecutor's loyalty to justice *versus* obeisance to antiwhite racism in Black communities. This interpretation is reinforced by much of the hyperbolic and at times contemptuous public commentary that helped construct the Darden Dilemma: the brave, law-abiding Black prosecutor *versus* the Simpson-loving, lawless Black community and jurors;<sup>42</sup> the truth-seeking "colorblindness" of the State *versus* the inflammatory race-baiting of the defense; the Black attorney's choice of seeking justice (even at the risk of being called a sellout) *versus* playing the race card.<sup>43</sup> By failing to reflect upon the distortion of meaning inherent in such constructions, Darden was as much a victim of these false dichotomies as he was their embodiment and defender.

A more nuanced understanding of the Darden Dilemma would acknowledge the integrity of Black communities, Black jurors, and Black attorneys in Darden's position who inevitably confront similar predicaments. This reinterpretation would focus intently on the broader legal, political, and societal framework within which all of these actors operate.<sup>44</sup> As discussed earlier, it is my view that racism severely limits the public credibility and lawyering choices of Black attorneys not only in a vertical, ladder-climbing, "glass ceiling" career sense, but also in terms of the latitude and autonomy

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("I've been battling this ever since law school in 1984," said Orleans Parish assistant district attorney Glen Woods, who is black. "How can you walk in and prosecute another African-American when you know how we've been persecuted? There aren't many of us, but I'd rather be on the inside watching white people to make sure they don't screw us over.")

42. For an examination of various meanings of lawbreaking to Blacks, see Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

43. Ken Hamblin provides a particularly noxious example of this false dichotomization:

We all might assume that obeying the law and applying it equally under the Constitution would be a tough job for your average white racist member of the Ku Klux Klan, the Aryan Nation or the skinheads — hypothesizing that one of them could rise to power as a district attorney. We would demand nonetheless that they leave their bias behind to serve as the people's counsel.

But what are the obligations of minorities? Should we allow them to maintain a special allegiance to people of color?

... [M]inority prosecutors face people who see them as "turncoats for having the temerity to prosecute people of color."

I call that liberal hogwash, pure and simple. If you can't stand the heat, get out of the kitchen. Become a social worker or go to work in the public defender's office before pursuing the fast-track political career of a big-city prosecutor.

Stop polluting the legal profession.

Hamblin, *supra* note 35, at 15.

44. See, e.g., Varney, *supra* note 41 (discussing the complex effects of economic, political, philosophical, and personal factors on Blacks' decisions to become prosecutors). According to figures cited by an official of the National Black Prosecutors Association, approximately 800 (or three percent) of the 30,000 prosecutors nationwide are Black, as compared with four percent of the defense attorneys. See *id.*

that they are accorded in juggling and reconciling competing obligations to Black communities and to the legal profession at large. Moreover, as Black attorneys seek an integrated and authentic fusion of personal and professional identities in a legal system that relegates them to a mere token presence, they often face confinement along an extremely narrow continuum of stereotypical identities. If they choose a career path not typically associated with the pursuit of racial justice — for example, corporate law or criminal prosecution — dominant popular discourse (even more than the “Black community”) pigeonholes them with an array of labels (“assimilationist,” “colorblind,” “mainstream,” “conservative,” “sell-out”), all of which reinforce the ideology that such individuals are divorced from their “Blackness”; Black attorneys in such a situation face the dubious “privilege” of being rewarded and valorized by white institutional culture for the very qualities that garner doubt and suspicion from minority communities.<sup>45</sup> This contributes to the systemic schizophrenia that lies at the heart of the Darden Dilemma and that legitimately fuels Black community critiques in particular circumstances.<sup>46</sup>

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45. The role of whites — and not just or even primarily Blacks — in constructing and perpetuating these assumptions should not be underestimated. Consider also the vastly different ideological concerns that may undergird majority attitudes in their relations with so-called assimilationist Blacks in the context of the following retrospective on the life of Ronald H. Brown, the Black commercial lawyer and former Democratic National Committee chairperson who served as Commerce Secretary in the Clinton administration:

Some viewed Mr. Brown (the son of a middle-class family) as proof that race is no longer a barrier to success; that policies such as affirmative action — which they consider unfair anyway — should be jettisoned. “By any definition, he was an amazing success in the American political arena,” said Clint Bolick, vice president of the Institute for Justice, a public interest law firm that opposes affirmative action. “It kind of proves that the American system works; that if you’ve got brains and talent you can rise to the top regardless of your race.”

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... [M]any people, particularly business executives he dealt with as Commerce Secretary, say they did not see his race at all when they looked at him, just skill at deal-making and promoting American business interests abroad.

Steven A. Holmes, *Remembering Ron Brown: So Visible, but From Which Angle?*, N.Y. TIMES, Apr. 7, 1996, § 4, at 1. Assertions such as the one made by Bolick reveal an ignorance of — or perhaps refusal to respect — Mr. Brown’s relations with the community as well as his concerns for Black community empowerment.

46. There is some indication that the much-publicized Darden Dilemma has engendered broader public awareness of the persistence of these concerns among Blacks at least to a limited extent. Steven Holmes writes:

[I]f Mr. Brown evokes a confusion, it is focused mainly among whites. For in his adeptness at playing many roles, he was the very model for the increased number of blacks striding into the professional class — with varying degrees of success — who must straddle two different and often mutually suspicious worlds. As they deal with enhanced opportunities, glass ceilings, grumblings from whites that they are too willing to play the race card, and self-doubts about whether they are becoming Uncle Toms, they can look at Mr. Brown and see something startlingly familiar. Themselves.

On the other hand, Black attorneys who select a career typically thought of as more "community-oriented" in nature — for example, civil rights or criminal defense — are often accorded a different set of labels equally superficial and inadequate, which express dominant cultural assumptions that their race-based advocacy as well as their race compromise their ethics and their professionalism. Both models are founded upon an atomistic conception of the Black attorney as a solo agent who must somehow both represent and transcend categorical assumptions about her race.

Unfortunately, at present the burgeoning genre of legal literature on lawyering theory includes little to address these concerns, but a few notable exceptions exist. For example, in a recent essay Paul Butler effectively describes the genesis of his own "prosecutor's dilemma" as deriving not from any unfair, externally imposed community pressure, but from his own introspection and evolving self-critique regarding the paradoxical nature of his work:

I was a Special Assistant United States Attorney in the District of Columbia in 1990. I prosecuted people accused of misdemeanor crimes, mainly the drug and gun cases that overwhelm the local courts of most American cities. As a federal prosecutor, I represented the United States of America and used that power to put people, mainly African-American men, in prison. I am also an African-American man. While at the U.S. Attorney's office, I made two discoveries that profoundly changed the way I viewed my work as a prosecutor and my responsibilities as a black person.

The first discovery occurred during a training session for new Assistants conducted by experienced prosecutors. We rookies were informed that we would lose many of our cases, despite having persuaded a jury beyond a reasonable doubt that the defendant was guilty. We would lose because some black jurors would refuse to convict black defendants who they knew were guilty.

The second discovery was related to the first, but was even more unsettling. It occurred during the trial of Marion Barry, then the second-term mayor of the District of Columbia. Barry was being prosecuted by my office for drug possession and perjury. I learned, to my surprise, that some of my fellow African-American prosecutors hoped that the mayor would be acquitted, despite the fact that he was obviously guilty of at least one of the charges — he had smoked cocaine on FBI videotape. These black prosecutors wanted their office to lose its case because they believed that the prosecution of Barry was racist.<sup>47</sup>

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*Id.* at 4. For a more extended consideration of the burdens of Black professional life, see ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993); JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1994).

47. Butler, *supra* note 15, at 678 (footnotes omitted).

Butler proceeds from these perceptions to question the broader racial implications of his own prosecutorial role, and to advance the thesis that the race of a Black defendant is "sometimes a legally and morally appropriate factor for jurors to consider in reaching a verdict of not guilty or for an individual juror to consider in refusing to vote for conviction."<sup>48</sup>

In a related vein, David Wilkins examines the dilemmas of Black law students and attorneys who seek to integrate a career in corporate law with goals of racial justice and Black community responsibility, and advances an "obligation thesis" that urges "black corporate lawyers to recognize that they have moral obligations running to the black community that must be balanced against other legitimate professional duties and personal commitments when deciding on particular actions and, more generally, when constructing a morally acceptable life plan."<sup>49</sup> To this end, Wilkins recommends that law schools take an active role in assisting Black law students in acquiring the critical skills and empirical knowledge needed to avoid the pressures of assimilation and seeming "race neutrality" that attends corporate legal practice.<sup>50</sup>

The Darden Dilemma, then, might be more usefully and broadly explored as an ongoing interplay of competing values within Black attorneys who are attempting to puzzle through the implications of their professional choices for the well-being of Black communities. This inner tension may be influenced, heightened, and at times perhaps exacerbated by Black community critiques, but it is inherently and inevitably a result of a legal system that devalues all Black lives, including the token Black attorneys it ostensibly valorizes as the honored few. According to this proposed redefinition, the Black community did not create the Darden Dilemma, nor did Christopher Darden or Black prosecutors generally. Rather, it is an unavoidable structural component of a legal system originated and maintained under racial hierarchy. Armed with this revelation, Black attorneys can be empowered to *expand* their choices, rather than be relegated to them.

Indeed, given the seeming inevitability of the Darden Dilemma and other paradoxes in the Black lawyer's experience, it would appear to be a sign of mental health that Black lawyers and Black communities continue to experience and express cognitive disso-

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48. *Id.* at 679.

49. Wilkins, *supra* note 18, at 1984.

50. *See id.* at 1984, 2013-26.

nance and chronic dissatisfaction with their assigned lot in the legal system.<sup>51</sup> In this regard, the Darden Dilemma might be reclaimed and revitalized by Black attorneys and Black communities as a basis for reconnection and debate.<sup>52</sup> I would hope that this reconnection would differ greatly from the wearying pressures of majority-imposed race work discussed above, in that the underlying notions of obligation would be developed through community-based reflection, rather than through the norms of mainstream legal practice.

### B. *The Fallacy of Colorblind Lawyering*

The above-proposed redefinition of the Darden Dilemma also can serve to question an overly rigid adherence to notions of colorblindness in lawyering strategy. In using the term "colorblind" lawyering, I draw upon the work of critical race theory, which explores broadly the premise that ineradicable currents of racism pervade the law, and advances race consciousness as a method of analyzing and ameliorating racism's effects.<sup>53</sup> Critical race theorists challenge prevailing assumptions that race and color are social and legal categories that can be made *not* to matter simply by pronouncing them — even from a hopeful, liberal standpoint — to be inconsequential. According to these critiques, the most perilous fallacy of colorblind ideology is that it is wishful or wilful determination, or both, to ignore historical and systemic racism perpetuates the false belief that "racelessness" is equivalent to neutrality, objectivity, fairness, and equality.<sup>54</sup> As applied to the lawyering process, I intend the term "colorblind" lawyering to connote advocacy strate-

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51. In her memoirs of her life of "volunteer slavery" as a Black journalist in predominantly white environments, Jill Nelson vividly describes the mental and emotional strains involved in the juggling of contradictory professional and personal identities:

I've also been doing the standard Negro balancing act when it comes to dealing with white folks, which involves sufficiently blurring the edges of my being so that they don't feel intimidated, while simultaneously holding on to my integrity. There is a thin line between Uncle Tomming and Mau-Mauing. To fall off that line can mean disaster. On one side lies employment and self-hatred: on the other, the equally dubious honor of unemployment with integrity. Walking that line as if it were a tightrope results in something like employment with honor, although I'm not sure exactly how that works.

JILL NELSON, *VOLUNTEER SLAVERY* 10 (1993).

52. Consider how Delgado urges the rejection of externally imposed "role model" burdens in favor of a more liberating relationship between minority legal professionals and their communities. See Delgado, *supra* note 9, at 1230-31.

53. For recent critiques of colorblind mythology, see generally Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); HANEY LÓPEZ, *supra* note 2; Harris, *supra* note 8.

54. Kimberlé W. Crenshaw, a principal critical race theorist, elucidates this point in writing that the ostensible "objectivity of legal analysis is grounded in the apparent perspectivelessness of the dominant discourse." Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy In Legal Education*, 11 NATL. BLACK L.J. 1, 12 (1989).

gies premised upon the position that racism is or should be characterized as irrelevant to a particular context, even if it has been otherwise raised in the proceedings.<sup>55</sup>

In the Simpson case, this norm turned out to be of paramount and ultimately dispositive significance, particularly given Darden's vociferous public insistence from early in the proceedings that race was not an issue in the case. From a critical race-conscious as well as a pragmatic perspective, the flawed and indeed misleading nature of the publicly advanced prosecutorial stance of colorblindness is obvious. Even within the framework of the prosecution's proffered theory of the case, there would have been a significant difference between arguing the indeterminate or minimal role of racism in the case in chief and claiming that allegations of racism were simply irrelevant. Regardless of one's view of the strength of the case against Simpson — and indeed regardless of one's view of *who* was responsible for first articulating race as a factor — issues of race permeated the case from its inception: from prosecutorial strategies regarding where to try the case; to the acquiescence on both sides to try the case in part in the voyeuristic "court of public opinion"; to both sides' selection of jurors and counsel; and so forth.<sup>56</sup> Against this backdrop, the prosecution's repeated assertions that race was not an issue in the case appeared not only wishful and deluded, but deliberately misleading. Although the prosecution's stance is more accurately and comprehensibly explained as the argument that race was irrelevant to the factual predicates of the defendant's guilt or innocence, this point was obscured by the prosecution's broader rhetorical incantation of the "race doesn't matter" theme. This strategic stance of avowed "racelessness" in the face of the realities of the unfolding Simpson defense and its broader social context illustrate the fallacy of colorblind lawyering: pretending and asserting that race doesn't matter is not equivalent to neutrality and "perspectivelessness."<sup>57</sup> In fact, it *is* a perspective: one of studied indifference to the significance of race.

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55. For a race-conscious critique of the "liberal regime" of colorblindness in criminal defense advocacy, see Alfieri, *supra* note 18, at 1331-32 (arguing for the "race-ing" of legal ethics with regard to criminal defense lawyers' deployment of disempowering racial narratives).

56. As Brent Staples observes:

The statement that race had no place in the trial is dishonest on its face. The so-called race card was played when District Attorney Gil Garcetti decided to try the case before a mainly black jury downtown instead of before a white jury in Santa Monica. Conviction by a mainly black jury would insulate Mr. Garcetti from riots like those that accompanied the acquittal of the white policemen who beat Rodney King. Brent Staples, *Millions for Defense*, N.Y. TIMES, Apr. 28, 1996, § 7 (Book Review), at 15.

57. On "perspectivelessness," see Crenshaw, *supra* note 54, at 10-12.

The misguided and unrealistic adoption of a model of colorblind lawyering can pose especially onerous pressures on the Black attorney. In seeking to reconcile a stated professional — and perhaps even personal — norm of colorblind ideology with the personal experiential knowledge that of course race *does* matter significantly in the legal system, whether or not one wants it to matter, the Black attorney in such a situation encounters the daunting task of synthesizing conflicting ethical, personal, and advocacy priorities.

Thus, for example, Darden undermined his own colorblind lawyering strategy in one of the most highly publicized Darden-Cochran conflicts of the proceedings: his courtroom battle with Cochran over the admissibility of testimony regarding prosecution witness Mark Fuhrman's use of the epithet "nigger." Darden's ultimately unsuccessful argument for exclusion reflected simultaneously the colorblind position that race was not and should not be allowed to develop as a factor in the case, and the tacitly race-conscious realization that the racist utterances of a key witness would be of dispositive significance to the Black jurors:

If you allow Mr. Cochran to use this word and play the race card . . . the direction and focus of the case changes: it is a race case now.

It becomes an issue of color . . . . It becomes a question of who is the blackest man up here . . . .

. . . .

It's the filthiest, dirtiest, nastiest word in the English language . . . . It will do one thing. It will upset the black jurors. It will say, Whose side are you on, "the man" or "the brothers"?

. . . There's a mountain of evidence pointing to this man's guilt, but when you mention that word to this jury, or any African-American, it blinds people. It'll blind the jury. It'll blind the truth. They won't be able to discern what's true and what's not.<sup>58</sup>

Given that — as argued above — every case argued by a Black attorney is at some level a "race case" in which the Black attorney is forced to represent race beyond the boundaries of the particular dispute in question, an ideology of colorblind lawyering puts the

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58. Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial*, N.Y. TIMES, Jan. 14, 1995, at 7. To this argument, Cochran responded:

It's demeaning to our jury . . . to say that African-Americans who've lived under oppression for 200-plus years in this country cannot work in the mainstream. African-Americans live with offensive words, offensive looks, offensive treatment every day of their lives. And yet they still believe in this country.

*Id.*; see also William Carlsen, *Race Issue Finally Boils Over in Simpson Hearing*, S.F. CHRON., Jan. 14, 1995, at A1, available in 1995 WL 5261467; Tony Freemantle, *Pair Argue Disclosure of Epithets*, HOUSTON CHRON., Jan. 14, 1995, at 1, available in 1995 WL 5882802; Lisa Resper et al., *Blacks Debate Issue of Race in Simpson Case*, L.A. TIMES, Jan. 15, 1995, at A1; Ed Vulliamy, *N-Word Stirs O.J. Trial's Racial Cauldron*, THE GUARDIAN (London), Jan. 22, 1995, at 16, available in 1995 WL 7575906.

Black attorney at a serious disadvantage: she must deny the realities of racism in order to appear balanced and fair in advancing the case of the client. The pervasive and systemic role of racism in the legal system belies the assumption that the world can be neatly divided into "race cases" and "nonrace cases." Repudiating colorblind lawyering does not mean making race the primary focus of every case, but it does require a thorough and honest response when race is articulated as even arguably an influence.

In sum, then, an ideology of colorblind lawyering has the potential to exacerbate further the professional and personal predicament of the Black attorney, whose everyday experiences as a lawyer underscore the reminder that issues of race matter enormously. This phenomenon may consign the attorney to the adoption of legal categories and strategies not reflective of the paradoxical nature of her role, which in turn may engender criticisms that the lawyer has simply abandoned or sold out Black community concerns. To conclude that a particular Black attorney in such a situation is a sellout or mere assimilationist — without addressing the insidiousness of the underlying welter of constraints — is to ignore the asphyxiating conditions in which many Black attorneys must pursue their careers.

### C. *The Cochran Conundrum: Accusations of Playing the Race Card and the Perils of Race-Conscious Lawyering*

If the Darden Dilemma may be reinterpreted to describe one set of constraints imposed upon Black attorneys, I use the term Cochran Conundrum to characterize another set of obstacles, encountered most frequently by Black lawyers who openly articulate issues of racism as relevant to a particular case. The name — derived, of course, from mainstream public and media reaction to Johnnie Cochran's explicitly race-based arguments in the Simpson case<sup>59</sup> — is meant to suggest that certain elements of the vehement

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59. See, e.g., Joseph Demma & Shirley E. Perlman, *Wrangling over "Race Card,"* NEWS-DAY, Jan. 14, 1995, at A7, available in LEXIS, News Library, NEWSKY file; Bill Maxwell, *Intraracism Snares Chris Darden*, ARIZ. REPUBLIC, Oct. 25, 1995, at B5, available in 1995 WL 2840305 ("The truth is that, along with using race as a blunt instrument against whites, blacks use it to craft relations with one another . . . . [T]he defense, led by the brilliant Johnnie Cochran, played the intrarace card . . . ."); Joseph Wambaugh, *Perspective on the Simpson Case; The Race Card, from Bottom of Deck*, L.A. TIMES, Aug. 24, 1995, at B9 (calling Cochran's allegations of racism in public perceptions of the case "black racism" and concluding that "Johnnie Cochran has not only played the race card, he's dealt it from the bottom of the deck"). For an example of the ironic use of race-card terminology to criticize anti-Black attitudes, see Anthony Lewis, *Trust Gone Bust in a Divided America*, HOUSTON CHRON., Oct. 9, 1995, at 22, available in 1995 WL 9408020 ("Even before the verdict some politicians and intellectuals were playing the race card to whites, arguing that blacks were too demand-



criticism directed against Cochran are representative of the disapproval faced by lawyers who implement race-conscious strategies in client representation. The current manifestation of this deep-seated disdain is the accusation that one is "playing the race card" and therefore unfairly skewing reasonable debate on the "merits" of a case by insisting that racism is a relevant issue in an otherwise raceless context.<sup>60</sup>

Although the genesis of the phrase "playing the race card" precedes the Simpson case, the term has achieved widespread usage through its frequent invocation in public discourse during and now after the trial to describe and deride various aspects of the Simpson defense-team strategy. Christopher Darden himself introduced the phrase into the trial proceedings at an early stage in rebutting Cochran's claim that Darden had been added to the prosecution team "just to show that if a black prosecutor sees O.J. guilty, he is being judged by the evidence at hand and not for some deep-seated bias."<sup>61</sup> At another odd juncture, Darden advanced the race-card accusation when he and Cochran bickered over Darden's attempt to ask a witness whether he had described a certain person's voice as "sound[ing] like the voice of a Black man."<sup>62</sup> And, as noted above, Darden argued that Cochran was playing the race card in

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ing. The greater danger of the Simpson verdict and the reactions to it is that the white majority will turn even further against measures to ameliorate inequalities of opportunity."

60. Interestingly, there is rarely discussion of what exactly the phrase "playing the race card" means in any individual context, although the accusation is often lodged with a casualness suggestive of an insider's "shorthand" — as though the reader will of course understand the author's meaning. In response, one might usefully invoke Angela Davis's blunt reminder: "Race is not a card." See Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, *NEW YORKER*, Oct. 23, 1995, at 56, 59. In an editorial assessing the closing arguments in the case, the *New York Times* offered some detail to its invocation of the criticism:

Mr. Cochran, showing the knack for the theatrics that successful trial lawyers need, argued forcibly and fairly that the racism and perjury on the part of former Los Angeles detective Mark Fuhrman cast doubt on Mr. Fuhrman's credibility and justified skepticism about some evidence. But he crossed a line when he urged the jury to look beyond the specifics of the O.J. case and send a broader message that would help "police the police" everywhere and stop further misbehavior by racist cops.

This was playing the race card with irresponsible sweep and remarkable viciousness. *Race Cards and Rebuttals*, *N.Y. TIMES*, Sept. 30, 1995, at 18 (editorial).

61. Maxwell, *supra* note 59.

62. For a transcript of this exchange as covered by the Cable News Network, see Testimony of Robert Heidstra, *Cable News Network*, Transcript #110-4, July 12, 1995, available in LEXIS, News Library, Script File. In a particularly unfortunate colloquy, Cochran insisted that Darden's question itself was "racist": "You can't tell by listening to someone whether they're black [or] white. . . . I think it's totally improper in America at this time in 1995 just to hear this and endure this." Annette Kornblum, *Is Race-Tagging a Voice Talkin' Trash or Truth? What Science Says About Speech and Stereotypes*, *WASH. POST*, July 23, 1995, at C7 (quoting Cochran and discussing ebonics, the linguistic study of "Black English," including the sound, inflection, rhythm, and pitch of its various colloquial dialects).

seeking to introduce into evidence Mark Fuhrman's use of the word "nigger."<sup>63</sup>

Although Darden's early and uninhibited use of the race-card trope in court did much to encourage its usage in public and media commentary, the saying attracted the most attention and acquired an almost talismanic significance when uttered by Robert Shapiro, Cochran's co-counsel, in a television interview shortly after the verdict. Shapiro, who is white, publicly and emphatically disavowed what he suggested was a manipulative and inappropriate use of race in his own co-counsel's defense strategy. Shapiro singled out Cochran with particular ire for including in his closing arguments rhetorical references to Hitler and the Holocaust in castigating the Los Angeles Police Department's failure to address the racist behavior of Mark Fuhrman. Shapiro asserted: "My position was always the same, that race would not and should not be a part of this case. I was wrong. Not only did we play the race card, we dealt it from the bottom of the deck."<sup>64</sup>

As emphasized from the outset, my focus is neither the substance of the Simpson prosecution itself nor the relative merits of individual lawyering strategies in the context of that case. One may legitimately view Cochran or Darden as a hero, foe, or pawn; one may legitimately view the now undisputed racism of Fuhrman as a controlling, major, or minor factor in the ultimate merits of the prosecution's case. But, I contend, the vituperation with which Cochran was labeled as, for example, an "oleaginous"<sup>65</sup> shyster who "shamelessly and shamefully stoked fires of racial animosity in the attempt to get his client off"<sup>66</sup> reveals far more than an individualized assessment of Cochran's capabilities as a lawyer. Outside the context of race — that is, both Cochran's and his client Simpson's race — Cochran's strategy might have been evaluated by his critics in more conventional terms as a zealous defense attorney's claim that the bias of a key prosecution witness was a highly relevant factor in assessing the prosecution's case; but because race — especially *Cochran's* race — powerfully affected public perceptions of his lawyering role, he became responsible for representing race it-

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63. See Noble, *supra* note 58.

64. Staples, *supra* note 56.

65. See Joan Beck, *It's Boiling Down to Race — Again; the Nation Has Had Enough of Trying to Stomach O.J. "the Victim,"* CHICAGO TRIB., Oct. 15, 1995, at 21.

66. Taki Theodoracopoulos, *OJ's Lawyers Play the Race-Hate Card*, THE TIMES (London), Mar. 19, 1995, at 11.

self.<sup>67</sup> Thus, one commentator in essence blamed Cochran for the nation's continuing racial tensions:

Were it not for the call by Simpson's black lawyer to the predominantly black jury to remember "you're the ones at war" against the racist white police — blatantly urging jurors to ignore the evidence of murder and to get even for society's past injustices — then the country quickly could have healed its wound.<sup>68</sup>

In my view, such venomous criticism is rooted in part in the suspicion and mistrust to which Black attorneys are subjected more broadly. Cochran had not only engaged in what his critics considered to be inappropriate advocacy; he had also violated a social taboo by rendering painfully explicit the racial overtones that had suffused the case from its inception. The angry, contemptuous nature of the playing-the-race-card accusation — lodged against the Simpson defense team generally but with particular scorn and ferocity against Cochran — epitomizes the resistance and even censure encountered by attorneys who use individual cases to pose broad critiques against systemic and institutional racism. When the "card-playing" attorneys happen to be Black, the hostility is compounded by underlying assumptions that *of course* Blacks cannot be trusted to "play fair" or to act responsibly with respect to issues of race. Thus, an explicit strategic decision to employ race-based advocacy is evaluated not only on professional terms but on deeply visceral ones. Such a decision runs the risk of being lambasted as whining, pandering, trickery, demagoguery, or manipulation; the advocate, in turn, must be prepared to be viewed in the lowest possible regard — even for a lawyer, or for a defense lawyer at that.

It is difficult to ignore the connections between context-specific invocations of the race-card accusation and the far-reaching animus with which explicitly antiracist, race-conscious critiques are met in a

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67. For the viewpoint that Cochran's courtroom strategy was "applied critical race theory," see Jeffrey Rosen, *The Bloods and the Crits*, THE NEW REPUBLIC, Dec. 9, 1996, at 27 ("[S]urely the most striking example of the influence of the critical race theorists on the American legal system is the O.J. Simpson case, in which Johnnie L. Cochran dramatically enacted each of the most controversial postulates of the movement before a transfixed and racially divided nation."). In my view, Rosen's assertion is highly questionable in at least two of its implicit assumptions: (1) that Cochran, a veteran defense attorney whose courtroom style and strategic sense are the products of decades of litigation, was influenced in *any* significant sense during the Simpson trial by the writings of critical race theorists; and (2) that Cochran's courtroom strategy exemplifies tenets of critical race theory any more than, say, pragmatic criminal defense representation. Rather, I contend, the "striking," "dramatic," and "controversial" characteristics to which Rosen refers stem at least as much from spectators' reaction to Cochran as a forceful and persuasive Black male advocate as from the putative novelty of his arguments.

68. William Safire, *After the Aftermath: Damage Done*, ATLANTA J. & CONST., Oct. 13, 1995, at A19, available in 1995 WL 6556856.

variety of contexts.<sup>69</sup> Like the proliferation of charges of "political correctness" in academic and popular discourse in the early 1990s,<sup>70</sup> the increasingly widespread and cynical iteration of playing the race card today substitutes mockery and trivialization for thoughtful reaction and response. Ironically but perhaps not so unintentionally, such pejorative denunciations themselves function as trumps by impugning not just the comments but the very integrity of the "race-talking" advocate; the not-so-subtle implication is that talking about race has turned into a matter of sophistry, gamesmanship, and hyperbole. The intolerance conveyed by such an accusation serves a policing function by warning the would-be race-card transgressor that his or her complaints of racism will be interpreted as irrelevant, self-serving, and maliciously advanced.

What, then, are the implications of the Cochran Conundrum for the Black lawyer who attempts to raise issues of race in a legal proceeding? As noted above, one primary concern is the likelihood that one's very integrity and credibility will be called into question to a degree that white colleagues do not experience; like Black judges who have suffered the insults of motions for disqualification filed simply because they are Black judges in "race" cases, the Black lawyer will be presumed incompetent to meet the ethical demands of her professional — albeit advocacy, rather than judicial — role. This presumption renders race-conscious lawyering a Sisyphean task: the Black lawyer must — again and again — monitor and evaluate the effects of her own racial identity on decision-makers' perceptions of the race-conscious strategies employed.

A second and more daunting effect of the Cochran Conundrum, however, is the deleterious impact that it may exert on the development of creative, progressive, and radical lawyering strategies and critiques. Like all innovations, race-conscious lawyering will have a chance to develop only if lawyers are given the latitude to theorize about the connections between individual cases and a broader soci-

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69. See, for example, Peter Collier and David Horowitz's castigation of *Today* show host Bryant Gumbel and actor Laurence Fishburne for complaining about Hollywood racism:

It was quite a spectacle. Here were two men making millions of dollars as African-American megastars, complaining about the white conspiracy to deny them success. . . .

Deploring the unreformable reality of American racism has become a ritual for African-American celebrities, almost like presenting an apartheid pass in order to retain their status in the community, even when their life experiences argue the exact opposite. Peter Collier & David Horowitz, *Hollywood's "Racism" Not So Black and White*, S.F. EXAMINER, Sept. 19, 1993, at D3, available in 1993 WL 8588751.

70. For an overview of the "political correctness" debate and its implications, see generally DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES (Paul Berman ed., 1992); TODD GITLIN, THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS (1995).

etal framework of racial hierarchy.<sup>71</sup> Given the current climate of resistance to such approaches, fewer and fewer advocates will choose to suffer the repercussions of being accused of playing the race card.

#### IV. CONCLUSION: ESCAPING THE STRAITJACKET

Perhaps the most unfortunate aspect of the heavily emphasized intrarace conflict between Cochran and Darden — and the metanarrative of “Black versus Black” animus upon which it seemed to capitalize — was the extent to which it neglected to address the preconstructed nature of their differences. Although Cochran and Darden, to be sure, embody different generational perspectives on and strategic approaches to their conceptions of what it means to be a Black attorney, their conflict was constructed in the sense that it was structured and influenced by racial attitudes and assumptions beyond their understanding and control. Moreover, it was worsened by the dominant gaze of media frenzy,<sup>72</sup> especially the omnipresent voyeurism induced by cameras in the courtroom. At times, lamentably, both attorneys seemed to fuel this metanarrative of intraracial hostility by reserving their most antagonistic courtroom battles for racially charged conflicts with each other.<sup>73</sup> Within the limited parameters of adversarial combat over the fate of O.J. Simpson and the tragically lost lives of Nicole Brown Simpson and Ronald Goldman, each attorney invoked — arguably necessarily — choices of lawyering strategy destined to pit one against the other on issues of race. These issues transcended — perhaps equally necessarily — the particulars of the case and contributed to the transformation of Cochran and Darden into competing symbols of Black legal professionalism.

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71. Integral to the race-conscious critical project is the exploration of gender and sexual-orientation hierarchies, as well as racial and color hierarchies. Certainly, important gender issues (especially domestic violence) were deliberately and strategically subordinated in the race-conscious lawyering of the Simpson defense team.

72. See Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 *LEGAL STUD. F.* 243, 244 (1991) (using feminist theorist Laura Mulvey's critique of the “male gaze” to describe the “dominant gaze” of media, which tends “to objectify and trivialize the racial identity and experiences of people of color, even when it purports to represent them”).

73. Sadly, at times these showdowns assumed a stagy, almost circus-like quality. For example, in their heated courtroom exchange over the admissibility of Fuhrman's use of racial epithets, Cochran turned to address Darden directly and chided: “I'm ashamed for Mr. Darden to allow himself to become an apologist for this man.” Noble, *supra* note 58. Darden was equally churlish toward Cochran throughout the trial, at one point turning to him to assert: “That's what has created a lot of problems for my family and myself, statements that you make about me and race.” *Simmering Ito Boils After Bickering*, ST. PETERSBURG TIMES, July 13, 1995, at A1.

Recognition of and resistance to the construction and accentuation of intraracial conflict is critically important in seeking to preserve relationships not only among Black lawyers, but also between those lawyers and Black communities. Racial hierarchy is well served by microcosmic patterns of seemingly idiosyncratic spats and divisions among Black attorneys. As long as Black attorneys and their communities fritter away precious energy and resources engaging in personal sniping, we will have few opportunities to challenge the broader framework of legal dysfunction that encompasses us all.

As argued above, erroneous constructions and false dichotomies deprive Black attorneys who seek to serve their communities of critically needed latitude; because of the straitjacketing effects of contemporary legal practice, Black attorneys have not even begun to have the opportunity to explore difficult questions of legal professionalism, ethics, community identification, race-conscious lawyering strategies, or political agenda formation.<sup>74</sup> Moving beyond the false dichotomies requires the realization that they serve the regressive purpose of miring Black lawyers and their communities in self-hatred and disrespect; such dichotomies must be supplanted by broader visions of lawyering than the narrow constructions that exist today. This is indeed a daunting task, but, as Judge Higginbotham suggested a generation ago, Black attorneys have always had to shoulder the burdens of representing race in more ways than one.

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74. For a persuasive argument that mainstream legal education should shoulder at least some responsibility for fostering these debates for the benefit of Black law students planning to enter the corporate sector, see generally Wilkins, *supra* note 18.